Filed 2/4/13 Booloon, Inc. v. Google, Inc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BOOLOON, INC., et al. Plaintiffs and Appellants, v. GOOGLE, INC., et al., Defendants and Respondents.	B240049 (Los Angeles County Super. Ct. No. SC112586) ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion filed herein on January 16, 2013, be modified as follows:

On page 4, in the first paragraph, seven lines down, Code of Civil Procedure section number "4310.10" is replaced with section number "430.10."

On page 7, in the second line of the first full paragraph, Code of Civil Procedure section number "410.10" is replaced with section number "430.10."

There is no change in the judgment.

Filed 1/16/13 Booloon v. Google CA2/3 (unmodified version)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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BOOLOON, INC., et al., Plaintiffs and Appellants, v. GOOGLE INC., et al., Defendants and Respondents.	B240049 (Los Angeles County Super. Ct. No. SC112586)

APPEAL from an order of the Superior Court of Los Angeles County, Rita Miller, Judge. Affirmed in part, reversed in part.

Qin Zhang, in pro. per., and for Plaintiffs and Appellants.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy and Kevin L. Vick for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Qin Zhang (Zhang) and Booloon, Inc. (Booloon) appeal an order in favor of defendants and respondents Google, Inc. (Google) and Nick Mote (Mote). The order sustained defendants' demurrer to plaintiffs' complaint without leave to amend and imposed monetary sanctions on plaintiffs, jointly and severally, in the amount of $10,982. We shall affirm the order with respect to the demurrer and monetary sanctions against Zhang but reverse the order to the extent it imposes monetary sanctions against Booloon. We shall also deny defendants' motion for sanctions on appeal.

FACTUTAL AND PROCEDURAL BACKGROUND

1. *The Parties*

Zhang is an attorney. She claims to have developed "technology in language processing" that can be used for internet searches. Zhang licensed her technology to Booloon, a company she formed with her brother Hong Zhang. Google is a publicly traded corporation. Among Google's services is a widely used search engine. Mote is an employee of Google.

2. *The First Action*

In May 2010, Zhang and Booloon filed a lawsuit (the First Action) against Google and Mote in the Central District of Los Angeles County Superior Court. Zhang represented herself and Booloon in the First Action.

Plaintiffs' operative pleading in the First Action was their first amended complaint (FAC), which set forth causes of action for (1) breach of confidence, (2) breach of oral contract, (3) breach of implied-in-fact contract, (4) fraud, (5) constructive fraud, (6) unjust enrichment, (7) constructive trust, and (8) invasion of privacy. The gravamen of the FAC was that Mote and Google allegedly misappropriated the technology Zhang developed and licensed to Booloon. The FAC alleged that Mote learned of the technology at a meeting he had with Zhang and others at a coffee shop on June 1, 2008.

The trial court sustained defendants' demurrer without leave to amend to the first, second, third, sixth and eighth causes of action in the FAC and subsequently granted defendants' motion for summary judgment with respect to the remaining causes of action.

Before defendants filed their motion for summary judgment, plaintiffs filed a motion for leave to filed a second amended complaint (SAC). The proposed SAC added new causes of

action for breach of the implied-in-fact contract and negligent misrepresentation. On April 6, 2011, the trial court denied the motion for leave to amend on the grounds (1) plaintiffs unreasonably delayed bringing the motion, (2) defendants were prejudiced by the delay, and (3) the proposed new claims were preempted by federal copyright law.

On October 6, 2011, the trial court entered judgment in defendants' favor. Plaintiffs timely appealed this judgment.

3. *The Second Action*

On May 11, 2011, while the First Action was pending in the superior court, plaintiffs filed a second lawsuit against defendants in the West District of Los Angeles County Superior Court (the Second Action). Zhang represented herself and Booloon in the Second Action. Plaintiffs did not file a notice of related cases.

The complaint in the Second Action set forth causes of action for (1) breach of implied-in-fact contract and (2) negligent representation. These causes of action were based on the same facts and same legal theories as the two new causes of action in the proposed SAC in the First Action.

On May 19, 2011, defendants' counsel sent a letter to Zhang demanding that she dismiss the complaint in the Second Action immediately, and advising her that defendants may seek sanctions pursuant to Code of Civil Procedure section 128.7.

On July 2011, in response to defendants' notice of related cases, the trial court deemed the First Action and Second Action related.

On or about October 28, 2011, defendants filed an "amended" demurrer[1] to the complaint. Defendants stated in this pleading that they demurred to the complaint, and each cause of action therein, "pursuant to Code of Civil Procedure § 430.10." In the alternative, defendants moved to strike the complaint, and each cause of action therein, pursuant to Code of Civil Procedure sections 435 and 436. As a second alternative, defendants sought a stay of the action pursuant to Code of Civil Procedure section 4310.10, subdivision (c). The main ground for the demurrer was that the complaint should be dismissed because "a party may not file a new complaint to circumvent an adverse ruling in another action." Defendants' principal legal authority was *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 (*Ricard*), which we shall discuss *post*.

On or about October 28, 2011—the same date they filed their amended demurrer—defendants also filed an answer to the complaint As an affirmative defense, the answer stated that the complaint and each cause of action therein failed to state facts sufficient to state a cause of action.

On December 9, 2011, defendants served a motion for sanctions pursuant to Code of Civil Procedure section 128.7. The notice of motion stated that defendants moved for an award of $13,982 in sanctions in defendants' favor "against Qin Zhang, Esq., counsel for Plaintiffs Booloon, Inc. and Qin Zhang . . . ." Defendants filed this motion on January 5, 2012.

On January 31, 2012, the trial court held a hearing on the demurrer and motion for sanctions and issued a minute order regarding the same. The order stated: "The court sustains the demurrer without leave to amend and grants the motion for sanctions payable by plaintiffs, jointly and severally, to defendants in the amount of $10,982.00 within 30 days." The court did not specify, in its tentative ruling or minute order, the specific statutory ground upon which it sustained the demurrer. Instead, it relied primarily on the *Ricard* case. On March 22, 2012, plaintiffs filed a notice of appeal of the January 31, 2012, order.[2]

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[1] Defendants filed their initial demurrer on or about August 15, 2011. Their initial demurrer was apparently never adjudicated by the court.

[2] To the extent plaintiffs are challenging the trial court's award of sanctions, the order is appealable. (Code Civ. Proc., § 904.1, subd. (a)(11).) An order sustaining a demurrer without leave to amend, however, is not appealable. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 527, fn. 1.) We nonetheless exercise our discretion to treat the order as a judgment of dismissal, which is appealable. (*Id.* at pp. 527-528, fn. 1.)

4. *Google I*

On May 25, 2012, we issued an opinion adjudicating plaintiffs' appeal of the judgment in the First Action. (*Booloon, Inc. et al. v. Google, Inc. et al.* (May 25, 2012, B236734) [nonpub. opn.].) One of the arguments plaintiffs raised was that the trial court abused its discretion in denying their motion for leave to amend their FAC. We held, however, that plaintiffs forfeited this argument because plaintiffs did not provide a sufficient appellate record. We also rejected each of plaintiffs' other arguments and affirmed the judgment.[3]

5. *Motion for Sanctions in This Court*

On September 17, 2012, defendants filed a motion for sanctions in this court. In the motion, defendants contend that plaintiffs' appeal of the January 31, 2012, order is frivolous. Defendants seek to recover sanctions in the amount of $21,865.55, which they contend is the amount of attorney fees and costs they will incur defending this appeal. On November 28, 2012, we notified plaintiffs that we were considering imposing monetary sanctions on them.

DISCUSSION

1. *Defendants' Demurrer to the Complaint*

We review de novo the trial court's order sustaining defendants' demurrer without leave to amend. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 87.) As an initial matter, we shall address plaintiffs' waiver argument. They contend defendants waived their right to demur to the complaint by simultaneously filing an answer. This is simply not true. Code of Civil Procedure section 430.30, subdivision (c) provides: "A party objecting to a complaint . . . may demur and answer at the same time." Further, Code of Civil Procedure section 472a, subdivision (a) provides: "A demurrer is not waived by an answer filed at the same time." Defendants therefore did not waive their demurrer by simultaneously filing their answer.

Next, plaintiffs argue defendants' demurrer was "defective" because it was combined with a motion to strike. We disagree. If a defendant attacks a complaint with a demurrer and motion to strike, both matters must be heard at the same time. (Cal. Rules of Court, rule 3.1322, subd. (b).) Although it is better practice to file a demurrer and a motion to strike separately (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) ¶ 7:162:1, p. 7(I)-66), there is no express rule prohibiting a defendant from combining a demurrer

[3] On June 18, 2012, we modified the opinion without changing our judgment.

and motion to strike in one document, as was done here. Plaintiffs' reliance on *Brooks v. Douglass* (1867) 32 Cal. 208 is misplaced because that case does not address the issue of whether a demurrer and motion to strike can be filed in one document.

Plaintiffs also argue the trial court should have stayed its ruling on the demurrer because their appeal of the judgment in the First Action was still pending at the time. They did not, however, make this argument in their opposition to the demurrer, and thus forfeited it on appeal. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.)

Plaintiffs further argue the demurrer should have been overruled because it did not state the specific statutory ground(s) it was based on. Code of Civil Procedure section 430.10 specifies nine different grounds for demurrer to a complaint. (Code Civ. Proc., § 430.10, subds. (a)-(i).) Code of Civil Procedure section 430.60 provides: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint . . . are taken. Unless it does so, it *may* be disregarded." (Italics added.) Here, apart from requesting, in the alternative, a stay pursuant to Code of Civil Procedure section 430.10, subdivision (c),[4] the demurrer did not distinctly specify the subdivision(s) it was based on. Although the trial court could have, in its discretion, disregarded the demurrer for this procedural defect, it did not abuse its discretion by considering the demurrer on the merits.

Finally, plaintiffs argue the trial court should have overruled a general demurrer pursuant to Code of Civil Procedure section 410.10, subdivision (e),[5] or a special demurrer pursuant to any of the other subdivisions of the statute. Defendants do not specify the statutory basis for their demurrer in their brief. Instead, like the trial court, they rely mostly on the *Ricard* case.

In *Ricard*, the trial court was faced with circumstances very similar to those in this case. The court denied the plaintiffs' motion for leave to amend their complaint to add a claim for

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[4] A defendant can object by demurrer to a complaint on the ground that "[t]here is another action pending between the same parties on the same cause of action." (Code Civ. Proc., § 430.10, subd. (c).) This is essentially a plea of abatement. (*Plant Insulation Co. v. Fireboard Corp.* (1990) 224 Cal.App.3d 781, 787.)

[5] Code of Civil Procedure section 430.10, subdivision (e) provides that a party may object to a complaint on the ground that it "does not state facts sufficient to constitute a cause of action."

conspiracy to commit fraud. (*Ricard, supra*, 6 Cal.App.4th at p. 159.) In response, the plaintiffs filed a new complaint in a different district of the same superior court asserting the identical claim they had sought to assert in the first action. (*Ibid.*) The trial court sustained the defendants' demurrer to the new complaint without leave to amend, entered a judgment of dismissal, and granted the defendants' motion for monetary sanctions. The Court of Appeal affirmed. (*Id.* at p. 162.)

In its opinion, the Court of Appeal stated that the trial court had "authority" to sustain the demurrer to prevent the plaintiffs from "evad[ing] its prior ruling by filing the second action." (*Ricard, supra*, 6 Cal.App.4th at p. 162.) The Court of Appeal, however, did not specify the particular statutory ground for demurrer. Instead, it stated the following: "A trial court has authority to *strike* sham pleadings, or those not filed in conformity with its prior ruling. (See Code Civ. Proc., § 436; [citation].) With almost frightening candor [the plaintiffs] acknowledge that the present suit was filed solely to circumvent the court's prior adverse ruling. Consequently, it could properly be *struck* . . . ." (*Ricard*, at p. 162., italics added.) The court further stated that the plaintiffs' second suit "would merely have split their cause of action in violation of the policy against misuse of court time." (*Ibid.*)

Although the *Ricard* court did not expressly state it was treating the defendants' demurrer as a motion to strike, its reasoning implies it did just that. Perhaps most telling is *Ricard*'s reliance on Code of Civil Procedure section 436. This statute provides that a court may, upon a motion of a party or "at any time in its discretion, and upon terms it deems proper: [¶] . . . [¶] (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436.) *Ricard* held that in response to a demurrer, a trial court can strike a complaint pursuant to this statute if the complaint is merely an attempt to evade the court's prior ruling denying the plaintiff leave to amend his pleading.

In the present case, the trial court did not need to treat defendants' demurrer like a motion to strike because defendants, in the alternative, actually moved to strike the complaint. Under *Ricard*, the trial court clearly had the authority to sustain the demurrer or grant the motion to strike. We need not determine whether the trial court should have done one or the other, or both,

because we only review whether the judgment[6] was correct, not the court's reasoning. (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.)

2. *Motion for Sanctions in the Trial Court*

Code of Civil Procedure section 128.7, subdivision (b) provides that when an attorney or unrepresented party signs a pleading, he or she is certifying, "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," that, inter alia, the claims therein "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law."

When a defendant is served with a complaint that violates Code of Civil Procedure section 128.7, he or she may seek monetary sanctions against the attorneys or parties who violated the statute. (Code Civ. Proc., § 128.7, subd. (c).) "To recover sanctions under Code of Civil Procedure section 128.7, the movant need not show subjective bad faith, but instead that the challenged conduct was ' "objectively unreasonable." ' " (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225, fn. 7 (*Corona*).)

"Under section 128.7, '[a] party seeking sanctions must follow a two-step procedure. First, the moving party must serve on the offending party a motion for sanctions. Service of the motion on the offending party begins a [21]-day safe harbor period during which the sanctions motion may not be filed with the court. During the safe harbor period, the offending party may withdraw the improper pleading and thereby avoid sanctions. If the pleading is withdrawn, the motion for sanctions may not be filed with the court. If the pleading is not withdrawn during the safe harbor period, the motion for sanctions may then be filed.' " (*Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698, fn. omitted (*Martorana*).) If the moving party does not comply with the strict procedural requirements of Code of Civil Procedure section 128.7, the trial court must deny the motion. (*Galleria Plus, Inc. v. Hanmi Bank* (2009) 179 Cal.App.4th 535, 538; *Corona*, *supra*, 172 Cal.App.4th at p. 1225, fn. 7.)

We generally review an order for monetary sanctions for abuse of discretion. (*Martorana*, *supra*, 175 Cal.App.4th at p. 698.) "However, the proper interpretation of a statute

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[6] As stated *ante*, we are treating the minute order dated January 31, 2012, as a judgment of dismissal.

relied upon by the trial court as its authority to award sanctions is a question of law, which we review de novo." (*Ibid.*)

a. *Sanctions Against Booloon*

Defendants did not comply with the procedural requirements of Code of Civil Procedure 128.7 with respect to Booloon. Their notice of motion only stated that they were seeking monetary sanctions against Zhang, as counsel for plaintiffs. It did not state defendants were seeking sanctions against Booloon too. Booloon thus was never given a 21-day safe-harbor period, as the statute requires. Yet the trial court imposed monetary sanctions on Booloon, jointly and severally, with Zhang. Further, we agree with Booloon that the court's imposition of sanctions on the company in the absence of a noticed motion seeking the same raises serious due process concerns. We therefore reverse the January 31, 2012, order to the extent it imposes monetary sanctions on Booloon.

b. *Sanctions Against Zhang*

As explained *ante*, under *Ricard* plaintiffs were not entitled to evade the trial court's order denying them leave to add two causes of action in the First Action by asserting the exact same causes of action in the Second Action. Plaintiffs' Second Action therefore was objectively unreasonable. Further, plaintiffs did not argue in their opposition to defendants' motion for sanctions for the extension, modification, or reversal of existing law or the establishment of a new law. The trial court therefore did not abuse its discretion in awarding sanctions against Zhang.

3. *Motion for Sanctions in this Court*

On motion of a party or on our own motion, we may impose monetary sanctions on a party or an attorney for taking a frivolous appeal or appealing solely to cause delay. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276(a).) "[A]n appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650, accord *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 188.)

Here, there is no evidence that the subjective reason plaintiffs prosecuted this appeal was to harass defendants or to delay an adverse judgment. Moreover, plaintiffs' appeal was not

totally and completely without merit. Although we reject most of plaintiffs' arguments, we agree with plaintiffs that the trial court erroneously granted monetary sanctions against Booloon. This error, by itself, justified the appeal. We therefore deny defendants' motion for sanctions on appeal.

DISPOSITION

Treating the order sustaining the demurrer as a judgment of dismissal, we affirm. We also affirm the order imposing monetary sanctions against Zhang in the amount of $10,982, but reverse the order imposing monetary sanctions against Booloon. In the interests of justice, the parties shall bear their own costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.